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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1464

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, et al *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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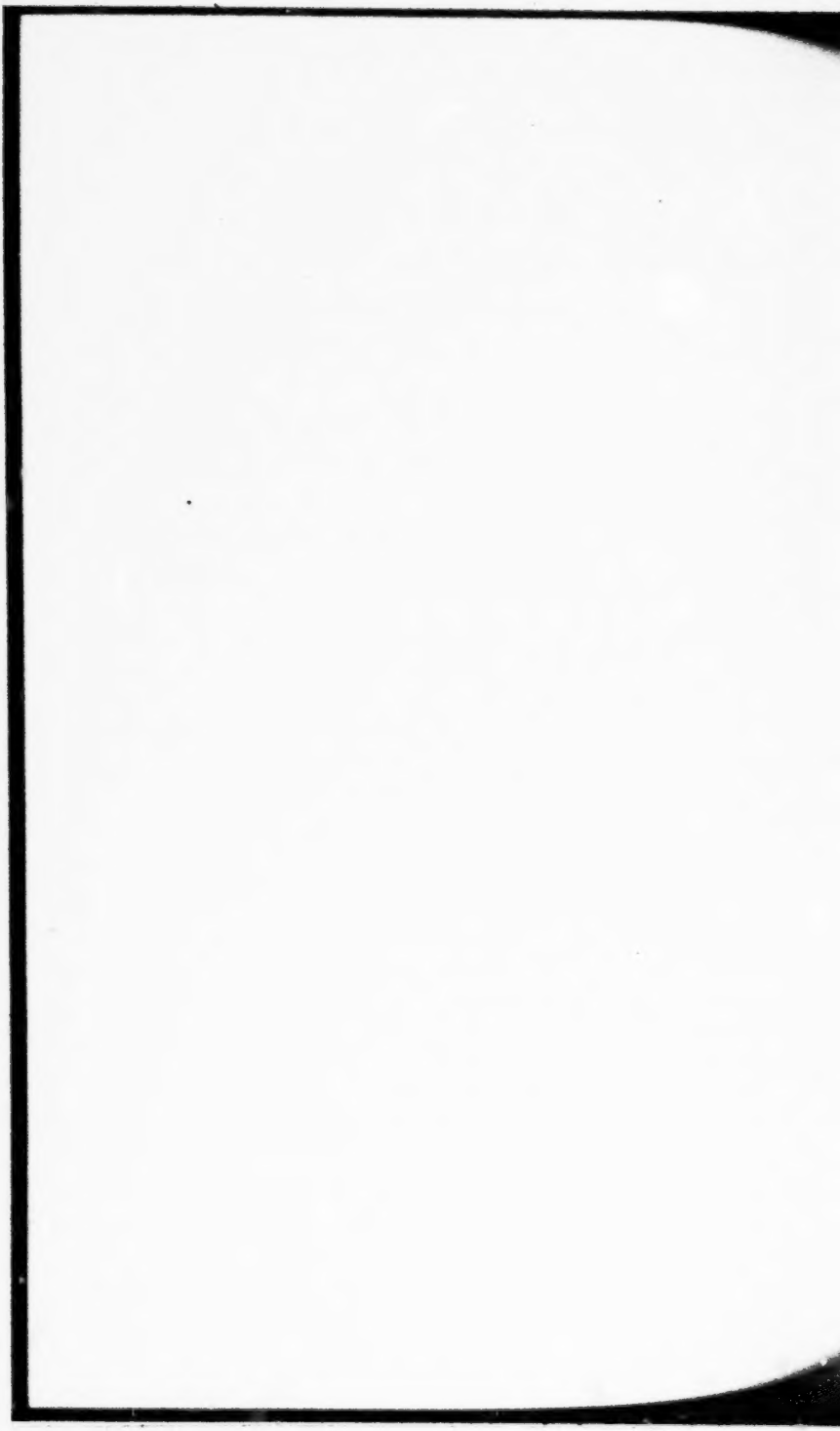

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INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of the Case	3
Reasons for Granting the Writ	8
1. The Decisions Herein Conflict With the Decisions of Other Courts of Appeals, and With Those of the National Labor Relations Board, as to the Validity of Authorization Cards Obtained as the Result of Misrepresentation of Majority Status by the Soliciting Union	8
2. The Decisions Herein Raise Serious Constitutional Questions as to Infringement of Employer Free Speech Under the First Amendment and Section 8(c) of the National Labor Relations Act	13
3. The Decisions Herein Violate the Substantial Evidence Test and Evade the Free Speech Protections of the First Amendment and Section 8(c) of the Act	15
4. The Decisions of the Board and Court Herein Raise Significant Questions Concerning the Proper Application of the Standards Set Forth in *NLRB* v. *Gissel* for Determining the Appropriateness of Remedial Bargaining Orders	19
Conclusion	23

Page

Appendix A (The circuit court's denial of the Company petition for rehearing) 1a

Appendix B (The circuit court's judgment after remand) 2a

Appendix C (The circuit court's order after remand).. 3a

Appendix D (The company's memorandum of changed factual circumstances) 4a

Appendix E (The Board's supplemental decision and order) 6a

Appendix F (The circuit court's opinion before remand) 10a

Appendix G (Relevant provisions of the National Labor Relations Act) 13a

CITATIONS

CASES:

Acme Products, Inc. v. *NLRB*, 389 F. 2d 104 (C.A. 8, 1968) 18

Amalgamated Clothing Workers of America, AFL-CIO, (Sagamore Shirt Co.) v. *NLRB*, 305 F. 2d 898 (C.A.D.C., 1966) 8, 11

American Ship Building Co. v. *NLRB*, 380 U.S. 300 . 15

Bernel Foam Products Co., 146 NLRB 1277 5

Champion Pneumatic Machinery Co., 152 NLRB 300 (1965) 20

Chas. Weise Co., 133 NLRB 765, 766 (1961) 14

Engineers and Fabricators, Inc., 376 F. 2d 482, 487 (C.A. 5, 1967) 8

G & A Truck Line, Inc., 168 NLRB No. 106 (1967) 12

G & A Truck Line, Inc. v. *NLRB*, 407 F. 2d 120 (C.A. 6, 1969) 9, 12

Garrison v. *Louisiana*, 379 U.S. 64, 75 10

H. K. Porter Company, Inc. v. *NLRB*, — U.S. — (Mar. 2, 1970), 73 LRRM 2561 15

Joy Silk Mills v. *NLRB*, 185 F. 2d 732 (C.A.D.C., 1950) cert. den. 341 U.S. 914 5

BLEED THROUGH POOR COPY

Page

Kawneer Co., 164 NLRB No. 138 (1967) 13, 14
Linn v. *Plant Guards Local 114*, 383 U.S. 53 14
Lou DeYoung's Market Basket, Inc., 181 NLRB No. 10 (Feb. 13, 1970) 21
Lyon Incorporation, 145 NLRB 54, 72 (1963) 14
Marie Phillips, 178 NLRB No. 53 (Sept. 5, 1969) 12
Murray Ohio Manufacturing Company, 156 NLRB 840, 852 (1966) 14
NLRB v. *American Cable Systems, Inc.*, — F. 2d — (Mar. 30, 1970), 73 LRRM 2913 21
NLRB v. *Arkansas Grain Corp.*, 392 F. 2d 161 (C.A. 8, 1968) 18
NLRB v. *Cactus Petroleum, Inc.*, 355 F. 2d 755 (C.A. 5, 1966) 8, 12
NLRB v. *Clark's Gamble Corporation*, 407 F. 2d 179 (C.A. 6, 1969), rem. 396 U.S. 23, rem. to Bd. — F. 2d — (Mar. 4, 1970) 21
NLRB v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 18
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 .....3, 7, 10, 11, 13, 18, 19, 20, 22
NLRB v. *L. B. Foster Co.*, 418 F. 2d 1 (C.A. 9, 1969), cert. den. — U.S. — (Mar. 23, 1970) 21
NLRB v. *Metropolitan Life Insurance Company*, 380 U.S. 438 21
NLRB v. *Rohtstein*, 266 F. 2d 407 (C.A. 1, 1959) 9
Schwartzenbach-Huber v. *NLRB*, 408 F. 2d 236 (C.A. 2, 1969), cert. den. 396 U.S. 956 9
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 .....15, 17
WAIT Radio v. *F.C.C.*, — F. 2d — (C.A.D.C., 1969) .. 21

STATUTES:

National Labor Relations Act, as amended (61 Stat. 519, 29 U.S.C. Sec. 151 *et seq.*)

Section 7 .....11, 16

Section 8 (a) (1) 5, 6, 13, 14, 16, 17, 18, 20, 22

Page

Section 8 (a) (3) 6, 20
Section 8 (a) (5) 5, 6, 19
Section 8 (c) 2, 3, 14, 15, 17, 18
Section 9 (a) 13a
Section 10 (e) 15, 17
Section 10 (f) 15, 17

Title VII of the Civil Rights Act of 1964 (42 U.S.C. Sec. 1971, 2000-e, *et seq.*) 16

MISCELLANEOUS:

BNA, Labor Relations Yearbook, 1968, page 143 10

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No.

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC., *Petitioners*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Garland Knitting Mills of Beaufort, South Carolina, Inc., petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 18, 1969, remanding to the National Labor Relations Board, and following remand, entered on December 30, 1969.

OPINIONS BELOW

The opinion of the Circuit Court before remand, (App. F. *infra,* pp. 10a-12a), is reported at 414 F. 2d 1214, and after remand, although not yet officially reported, is reproduced in the Appendix hereto. (App. B *infra,* p. 2a). The original findings of fact, conclusions of law, and order of the National Labor Relations Board, before remand, are printed in the Joint

Appendix [1] and are reported at 170 NLRB No. 39, and the supplemental order of the National Labor Relations Board, (App. E, *infra,* pp. 6a-9a), is reported at 178 NLRB No. 62.

JURISDICTION

The judgment after remand of the U.S. Court of Appeals for the District of Columbia Circuit, was entered on December 30, 1969 (App. B, *infra,* p. 2a). A timely petition for rehearing was denied on February 9, 1970, (App. A, *infra,* p. 1a), and this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. May union authorization cards, signed upon and after misrepresentations that a majority of employees had already signed, when in fact a majority had not, be deemed valid and such misrepresentations irrelevant, in determining a union majority status?

2. Does a dissemination of views, argument or opinion which contains no threat of reprisal or promise of benefit, (below, the manufacturer's product identification label), lose its First Amendment and Section 8(c) protection and become unlawful interrogation solely because employee acceptance or rejection of the matter disseminated is observable?

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[1] "J.A. refers to the Joint Appendix in the Court of Appeals. "TR" refers to the stenographic transcript of the hearing; "G.C." refers to the NLRB General Counsel's exhibits; "RX" refers to the Respondent's exhibits; "TXD" refers to the Trial Examiner's Decision. The Joint Appendix and subsequent orders of the Board and Circuit Court have been certified and filed with this petition. General Counsel's exhibits 4-172, were certified to the Circuit Court, but not reproduced in the Joint Appendix. Certified copies have been filed with this petition.

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3. Is the subjective belief of some employees that promises were made in employer pre-election speeches sufficient to satisfy the substantial evidence requirement so as to deny the First Amendment and Section 8(c) protection, when the expressions of views, arguments and opinions, expressed in those speeches, themselves contained no threat of reprisal or promise of benefit?

4. Did the National Labor Relations Board and the Circuit Court correctly apply the principles enunciated in *Gissel* [2] to the substantial evidence contained in the record below?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth in Appendix G, *infra,* pp. 13a, 14a).

STATEMENT OF THE CASE

This case involves, *inter alia,* an order of the National Labor Relations Board directing the company to recognize and bargain with the Union [3], on the basis of a card count.

In late February, 1966, the Union commenced an organizational drive directed at the Company's employees. On the early morning of February 28, 1966, the Union promulgated a printed handbill claiming to have a majority, (a majority would be 161 employees), of employee authorizations. (RX 2, J.A. 491; TR 1326-1327, J.A. 369-370). Additionally, at the hearing below twelve employee witnesses testified, four of whom were General Counsel's witnesses, that they were

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[2] *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575.

[3] International Ladies Garment Workers Union, AFL-CIO.

variously told prior to their signing authorization cards that a "majority", "all", and "most" of the employees had already signed such cards.[4] A total of 169 cards

[4] Cards (G.C. 4-172) were received by date and totals as follows:

Date	Received	Cumulative Total
Through Feb. 24, 1966	16	16
Feb. 25, 1966	57	73
Feb. 26, 1966	60	133 (132 by the Trial Examiner's count, TXD, J.A. 609)
Feb. 27, 1966	20	153
Feb. 28, 1966	4	157
Through Mar. 7, 1966	12	169

Of the twelve witnesses, the four called by General Counsel to identify their own cards, were:

Name	Testimony	Exhibit No.	Date Signed
Catherine E. Heck	TR 68, J.A. 17	G.C. 9	2-25-66
Nora Viene Powell	TR 83, J.A. 18	G.C. 12	2-26-66
Helen Naomi Patterson	TR 466, J.A. 87	G.C. 132	2-26-66
Ruthie Mae Chisholm	TR 474, J.A. 92	G.C. 133	2-26-66

and the eight, whose cards were identified by Union agents, and who were called by the Company, were:

Name	Testimony	Exhibit No.	Date Signed	Union Agent
Arthur Smalls	TR 823-825, J.A. 201-202	G.C. 29	2-26-66	Spurgeon Griggs
Frances Cottle	TR 848-850, J.A. 211-215	G.C. 38	2-26-66	Sam Shirer
Rose Walfelt	TR 918-919, J.A. 229-230	G.C. 55	2-26-66	Jessie Riddle
Margie Allen	TR 886-887,891, J.A. 223, 224	G.C. 67	2-26-66	Mason London
Clara Jones	TR 892-893, J.A. 225	G.C. 10	2-27-66	Robert Whitt
Diana Delaney	TR 933-935, J.A. 235	G.C. 112	2-27-66	Robert Whitt
Jerry Simmons	TR 847-849, J.A. 211	G.C. 127	2-26-66	Bob Dehill
Freddie Wearrien	TR 870-872, J.A. 218-219	G.C. 139	2-27-66	Clarence Lofton

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were received by the Board, and counted, inclusive of these 12 who testified.

During the card campaign approximately 15 Union agents with a prepared standard "pitch", (TR 153, J.A. 28), staged what General Counsel styled a "blitzkrieg", over Friday, Saturday and through Sunday, February 27, 1966, and "had netted something in excess of 150 cards.", (TXD, J.A. 596) actually 153 cards. On March 7, 1966, the Union demanded recognition for the 321 employees whose names were maintained on the Company payroll on that date.

An election, following a representation petition, was held on May 13, 1966, resulting in 103 votes for the Union, 173 votes against Union representation, 3 votes being challenged. Upon objections, the Regional Director sustained one objection, set aside the election and directed a second election. (TXD, J.A. 596-597). Notwithstanding this direction of a second election, the General Counsel, approximately six months later issued complaints which, among other allegations, alleged refusals to bargain in violation of Section 8(a)(5) of the National Labor Relations Act, relying upon the *Joy Silk*[5] and *Bernel Foam*[6] rules.

It is from the findings by the Board of the Section 8(a)(5) violation including the finding of Union card majority status and irrelevancy of majority status misrepresentations, and the Section 8(a)(1) findings upon which they rest, that the Company now seeks relief.

The Board found that prior to the election of May 13, 1966, the Company violated Section 8(a)(1) of the

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[5] *Joy Silk Mills* v. *NLRB*, 185 F. 2d 732 (C.A.D.C., 1950), cert. den. 341 U.S. 914.

[6] *Bernel Foam Products Co.*, 146 NLRB 1277.

Act by making promises of benefit through speeches of the Company President, Edward Warren Bernat, while also finding that no overt promises were made, and that no one remembered what was said (J.A. 625, 631 and 657); and by unlawfully interrogating employees through the means of passing out Company product identification tags on the day before the election, and observing who accepted or rejected them, thus forcing employees, by such observation, to manifest their choice, (J.A. 658).

Subsequent to the election of May 13, 1966, the Company, on or about June 15, 1966, put into effect certain wage and benefit modifications. Although these benefit modifications had been previously determined upon in substantial part, and were part of an overall Company program ante-dating the March 7, 1966, demand (J.A. 369; G.C. 2, J.A. 447-471; J.A. 521, 526), the Board found this action violative of Section 8(a)(1) and (5) of the Act because of the pending unresolved question concerning representation. (J.A. 634, 649, 656).

Also subsequent to the election, in September, 1966, two employees were discharged and four employees permanently laid off who were members of the Union organizing committee of employees. During the period from September through December 1966, a total of approximately 70 employees were permanently laid off and approximately two-thirds of all remaining employees were temporarily affected by lay-offs. (TR 643-645, J.A. 142-143). The Board found these six terminations to be violative of Section 8(a)(3), and the Company has since offered reinstatement to each employee found to have been discriminated against.[7]

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[7] Memorandum of Changed Factual Situation, (App. D, *infra*, pp. 4a, 5a).

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Following a hearing, the Trial Examiner on October 26, 1967, issued his Decision (J.A. 594-655), finding as unfair labor practices those matters above set forth, except the allegation regarding dissemination of the company product identification tags, which the Trial Examiner recommended to be dismissed, (J.A. 632-634).

On March 28, 1968, the National Labor Relations Board issued its Decision and Order (J.A. 655-660), overruling the Trial Examiner as to the identification tags and finding the tag dissemination constituted unlawful interrogation, (J.A. 658), but upholding the Trial Examiner in all other respects.

Upon Petitions for Review by the Company and the Union, and for Enforcement by the Board, the Circuit Court affirmed the Board's Order, but remanded the case to the Board for consideration in the light of *Gissel, supra,* issuing its Judgment before remand and Opinion on July 18, 1969. (App. F, *infra,* pp. 10a-12a).

On September 11, 1969, the Board issued its Supplemental Decision and Order (App. E, *infra,* pp. 6a-9a), holding that although the Union had lost the representation election, the employer's unfair labor practices were such that it was unlikely that their lingering effects "could be neutralized by conventional remedies so as to ensure a fair rerun election", and reissued its order directing the Company to bargain with the Union.

On October 29, 1969, the Circuit Court accepted the Company's memorandum of changed factual situation, granted the Board's motion for enforcement, inferentially denying the Company's motion for review (App. C, *infra,* p. 3a), and on December 30, 1969, issued

its Judgment after remand, enforcing the Board's Order (App. B, *infra,* p. 2a). On February 9, 1970, the Circuit Court denied the Company's petition for rehearing, (App. A, *infra,* p. 1a).

REASONS FOR GRANTING THE WRIT

1. The Decisions Herein Conflict With the Decisions of Other Courts of Appeals, and With Those of the National Labor Relations Board, as to the Validity of Authorization Cards Obtained as the Result of Misrepresentation of Majority Status by the Soliciting Union.

a. In the instant case, at least twelve of the individual employees whose signatures were relied on to compute union majority status were told prior to their signing union authorization cards that "a majority" or all the other employees in the unit had already signed authorization cards. In truth, no such majority had been secured by the Union at the time.

The District of Columbia Circuit has previously held that misrepresentations of majority status are generally immaterial in determining the validity of authorization cards even when signed in reliance thereon.[8] Likewise, the Fifth Circuit has reached the same result,[9] although it subsequently reconsidered its position on misrepresentations, later holding that upon a showing of misrepresentation in procurement of cards the burden falls on the Board's General Counsel to show that the misrepresentation was not the cause of the authorization.[10]

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[8] *Amalgamated Clothing Workers of America, AFL-CIO, (Sagamore Shirt Co.)* v. *NLRB,* 365 F. 2d 898 (CA D.C., 1966).

[9] *NLRB* v. *Cactus Petroleum, Inc.,* 355 F. 2d 755 (CA 5, 1966).

[10] *Engineers and Fabricators, Inc.* v. *NLRB,* 376 F. 2d 482, 487 (CA 5, 1967).

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Herein, the Board found the misrepresentations of majority status to be immaterial[11] and its findings were affirmed by the Circuit Court.[12]

Other circuits have reached contrary results, holding that misrepresentations by union solicitors that a majority of employees have signed union authorization cards, when in fact a majority have not, to be such a misrepresentation as may invalidate any cards received thereafter.[13] This Court denied the Union's[14] petition for writ of certiorari in *Schwarzenbach-Huber* while the instant case was still before the District of Columbia Circuit upon, *inter alia,* this same general issue. In *Schwarzenbach-Huber,* the Circuit Court said that:

> "The intended effect of this widespread diffusion of the Union's false claim that it had a majority was undoubtedly to bring the reluctant sheep into the fold by telling them the fight was over, the Union won and they might as well get on the bandwagon. No cards handed to the Union after the making of such a misrepresentation could possibly be deemed valid."

(b) The pattern of misrepresentation by the union solicitors herein (footnote 4, *supra,* and RX 2, J.A. 491), discloses that the misrepresentations as to an already achieved majority status were general to all employees during the union "blitzkrieg", at a time

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[11] TXD, J.A. 618-619 and 658.

[12] (App. F, *infra,* p. 10a).

[13] *G&A. Truck Line, Inc.* v. *NLRB,* 407 F. 2d 120 (CA 6, 1969); *NLRB* v. *Rothstein,* 266 F.2d 407 (CA 1, 1959); *Schwarzenbach-Huber* v. *NLRB,* 408 F.2d 236 (CA 2, 1969), cert. den. 396 U.S. 956 (Dec. 8, 1969).

[14] Textile Workers Union of America, AFL-CIO.

when clearly no such majority status existed. Contrary to the norm of organizing efforts referred to in *Gissel,* of early employer notice, the union campaign among the employees herein commenced on the evening of Friday, February 25, 1966, and was virtually concluded, although still lacking a majority, by the end of Sunday, February 27, 1966, affording little or no employee opportunity to intelligently question the misrepresentation. On the morning of February 28th, the individual misrepresentations were followed by a union leaflet reiterating the majority misrepresentations. (J.A. 491)

Of the 169 cards ultimately received, 144 were authenticated by persons other than the purported signators. (TXD, J.A. 597). Such a pattern of misrepresentation and its effect upon the Board General Counsel's burden of proof in card majority cases was commented upon by NLRB Associate General Counsel H. Stephen Gordon, who observed that proof of a pattern of misrepresentation, although not yet squarely ruled upon "may raise interesting and important questions regarding the burden of proof in card majority cases": whether such proof will require testimony by *all* signers.[15] This question is made of far greater importance and urgency since the *Gissel,* ruling and should now be "squarely ruled on."

c. This case conflicts with the principles enunciated in *Garrison* v. *Louisiana,*[16] wherein this Court stated: "The use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic,

[15] BNA Labor Relations Yearbook, 1968, page 143, reporting on an address to Federal Bar Association, February 15, 1968.

[16] *Garrison* v. *Louisiana,* 379 U.S. 64, 75.

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social or political change is to be effected." *A fortiorari,* this reasoning would apply in situations of collective bargaining representation upon the basis of a card count, for surely no economic or social change can be more important to the worker than his choice of representation in matters affecting his own wages, hours and conditions of employment. To permit cards to be received and counted as valid in determining a representation status when some or all were secured through deliberate misrepresentation contravenes the provisions of Section 7 of the Act. Under these circumstances, whatever the actions of an employer giving rise to a non-election bargaining order, the ultimate result is to allow the Union to profit from their own intentional wrongdoing.

d. In *Gissel,* this Court recognized the inferiority of cards to elections and upon the question of misrepresentation in their solicitation stated:

> "As for misrepresentation, in any specific case of alleged irregularity in the solicitation of the cards, the proper course is to apply the Board's customary standards . . . and rule there was no majority if the standards were not satisfied." [17]

This case contravenes the Board's own standards as to union misrepresentation of majority status in securing authorization cards.

Six days before it issued its Supplemental Decision and Order in the instant case, the Board revised its own standards as to card majority misrepresentations. Previously, the Board had relied on *Amalgamated Clothing Workers of America, AFL-CIO* v. *NLRB, supra,* that such misrepresentations were generally

[17] 395 U.S. at 602, 603.

immaterial.[18] However, following the Sixth Circuit's decision in *G & A Truck Line,* (Footnote 13, supra) the Board renounced its absolutist view in favor of the following standard.

> "Where objective facts, as evidenced by events contemporaneous with the signing, clearly demonstrate that the misrepresentation was the decisive factor in causing an employee to sign a card, we shall not count such card in determining a union's majority."[19]

In spite of its renunciation of the immateriality standard, the Board on September 11, 1969, without further review or inquiry, reaffirmed its earlier card count majority findings even though premised upon immateriality of the union misrepresentation as to majority status. The Circuit Court then affirmed the Board per curiam.

The occurrence of such misrepresentations during the course of contested representation elections is becoming so commonplace and the present confusion and conflict as to their effect so pronounced, that this area of the law should be clarified, and justifies grant of certiorari to review the judgment below on this issue.

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[18] *G & A Truck Line,* 168 NLRB No. 106 (1967). To the same effect is *NLRB* v. *Cactus Petroleum, Inc., supra,* n.9 relied upon by the Trial Examiner and Board herein. (J.A. 619).

[19] *Marie Phillips,* 178 NLRB No. 53 (Sept. 5, 1969).

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2. The Decisions Herein Raise Serious Constitutional Questions as to Infringement of Employer Free Speech Under the First Amendment and Section 8(c) of the National Labor Relations Act.

The decision herein, that dissemination of the manufacturer's identification tags was violative of Section 8(a)(1), because their dissemination was observable, ignores the clear expression in *Gissel, supra,* that: "... an employer's right to communicate his views to his employees is firmly established and cannot be infringed upon by a Union or the Board. . . ." and disregards the Court's admonition that: "Any assessment of the precise scope of employer expression, of course, *must* be made in the context of its labor relations setting."

On May 12, 1966, the day before the election, there was no existing background of anti-union animus, and saving the question of the speeches, no suggestion of interference, restraint or coercion of any nature. At all times, including the day of the election, employees freely wore union insignia to and from work, and at the plant itself.[20]

On May 12, 1966, following a speech of the Company's President, some supervisors distributed tags to any employees who wanted them. (TXD, J.A. 633). Some employees wore them. Some did not. Contrary to the Board, which based its conclusion upon *Kawneer Co.*,[21] the Trial Examiner found no fault in the dissemination of the tags. The tags [22] contained no threat of reprisal or force or promise of benefit. Each case

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[20] TR 412-416, J.A. 68-69; Tr. 1073-1074, J.A. 281, TXD, J.A. 633.

[21] 164 NLRB 983.

[22] J.A. 500, RX 10 & 11.

cited by the Board, unlike the present case, embraced factual backgrounds in which "Vote No" cards were forced upon employees, amid voiced threats of reprisal.[23]

This case marks the first time in which innocuous material disseminated in an innocuous manner, in an innocuous context, has been found tantamount to an interrogation, on the sole grounds that observation of acceptance or rejection has forced the employee to declare himself. Such a rationale would necessarily deprive an employer of the right to disseminate written, printed, graphic or visual matter, however void of threat or promise, since "Dissemination" within the meaning of Section 8(c) of the Act, necessarily comprehends observable acceptance or rejection. If, as the decisions herein resolve, distribution of legitimate campaign material may be prohibited on the guise that observation is equivalent to interrogation and thus violates Section 8(a)(1), then Section 8(c), added to the Act in 1947, is effectively repealed, and the steadfast protection which this Court has accorded free speech[24] and its admonitions to the Board and lower

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[23] *Lyon Incorporation*, 145 NLRB 54, 72 (1963; *Chas. Weise Co.*, 133 NLRB 765, 766 (1961); both being representation cases and not unfair labor practice cases; *Murray Ohio Manufacturing Company*, 156 NLRB 840, 852 (1966), *Murray* was an unfair labor practice case, wherein distribution of "Vote No" cards occurred in a background of threats of reprisal, while at the same time a no solicitation rule was discriminatorily enforced against union oriented employees. *Kawneer, supra*, relied upon by the Board is wholly inapposite. There, the "Vote No" insignia were forced upon employees against a background of requiring removal of all Union insignia, threats of job loss, threats of plant closing, and direct interrogation as to voting intentions.

[24] *Linn* v. *Plant Guards, Local 114*, 383 U.S. 53; *NLRB* v. *Gissel Packing Co., supra* n.2.

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courts who have attempted to evade the limits of the Act,[25] are completely ignored.

The infringement of the free speech protections of the First Amendment and Section 8(c) justify the grant of certiorari to review the judgment herein.

3. The Decisions Herein Violate the Substantial Evidence Test and Evade the Free Speech Protections of the First Amendment, and Section 8(c) of the Act.

a) The reliance in the decisions herein on a presumed subjective belief of employees as to future company policy absent the union, without predication on or relation to objective findings as to employer expression of such policy, violates the substantial evidence test laid down by 10(e) and (f) of the Act and by this Court.[26]

The Board stated in its Decision and Order, (JA 657) that it adopted the Trial Examiner's findings of fact that company president Bernat made certain specific promises in his speeches. Actually, the supporting findings of fact, after quotation of certain testimonial excerpts, were, *inter alia,* as follows:

> "This multiplicity of speeches together with an interval of about 10 months between the election and the hearing renders it a practical impossibility in my opinion for anyone to recall precisely what was said by whom or when." (TXD, J.A. 625).

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[25] *H. K. Porter Company, Inc.* v. *NLRB,* — U.S. —, (Mar. 2, 1970), 73 LRRM 2561; *American Ship Building Co.* v. *NLRB,* 380 U.S. 300.

[26] *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474.

"It is clear that no one clearly recalls what was said by Bernat . . ." (TXD J.A. 631).

In spite of the above and his further finding, that Bernat made no overt promises, the Trial Examiner went on to conclude that "from what Bernat said the employees honestly reached the conclusion" that promises (wage and piece rate increases, change in overtime computation method, and Negro supervisors and service girls would be appointed) had been made. Such a conclusion is the rankest form of speculation.[27]

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[27] To bolster the failure of evidence, the Trial Examiner supported his conclusion of the 8(a)(1) violation with the following:

> "President Bernat is an accomplished public speaker as he himself acknowledges. His final speech by which in 5 or 6 minutes he whipped up the enthusiasm of the majority of his employees so that they were shouting 'Vote No' at the tops of their voices is an excellent example of his capabilities in this regard. I believe and I find that in his earlier speeches Bernat made no overt promises but rather dealt with the questions and with the issues in such a way that his employees believed that he had made these promises. An example is a matter of Negro supervision. He testified that he answered the call for the appointment of Negro supervisors with the statement that the appointment of supervisors would be based upon their ability. To the Negro employees, who believed that supervisors were appointed in part because of their race this statement might very well have been considered an assurance that Negro supervisors would be appointed." (TXD, J.A. 631-632).

This "example" selected as illustrative of the evidentiary support to findings that promises of benefit were made, and enforcement of the order based thereon, is incredible. The speeches below were made in May of 1966, two years after passage of the Civil Rights Act of 1964. Such a "promise" has no connection or identity with Section 7 of the National Labor Relations Act, and could not have. This was but a two year old statement of law of the Congress of the United States, expressed in Title VII of the Civil Rights Act of 1964. (42 U.S.C. Sec. 1971, 2000-e, *et seq.*).

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It reverses the entire reasoning process upon which the principle of substantial evidence is founded.

The conduct under scrutiny is Bernat's expressions, which are protected by the mantle of 8(c) of the Act and the free speech immunities of the First Amendment, unless Bernat in his expressions indulged in threats "of reprisal or force or promise of benefit". In order to determine whether Bernat's speeches to the company's employees exceeded the protection conferred by the Constitution and the National Labor Relations Act, it would be necessary to evaluate the content of the speeches and the context in which the spoken words were uttered. But, by the Trial Examiner's own admission this is an impossibility because no one recalls what Bernat said. If there is no evidence as to what the speaker in fact said, there can be no basis for determining his intent. To find an 8(a)(1) violation, the Board must have substantial evidence of *what was expressed* and that such expression had a coercive effect on its audience. Herein, a vital factor was missing, the content of Bernat's remarks, and no amount of inference can compensate for its absence.

It is axiomatic that decisions of administrative agencies must be supported by substantial evidence in the record viewed as a whole.[28] This time-honored judicial precept is also reflected in Sections 10(e) and (f) of the Act itself which require that findings of fact by the Board be supported by "substantial evidence on the record considered as a whole." Evidence which creates no more than a suspicion or amounts to nothing more than speculation as to the existence of

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[28] *Universal Camera Corp.* v. *NLRB, supra* n.26.

the conduct or activity under attack, serves as no basis for compliance with this substantial evidence test.[29]

The frequent reoccurrence of evaluations of this nature in NLRB cases involving pre-election speeches upon such evidentiary support make this a vitally important issue in labor law election litigation.

b) Here, the departure of the Board and Court from the strictures of the substantial evidence rule constitutes more than the mere failing to adhere to the statutory standard required in reviewing administrative rulings. It mortally strikes at Section 8(c) of the Act, and places an impossible burden on employers.

This Court stated in *Gissel, supra,* in consideration of *Sinclair's* position, that:

> "He can easily make his views known without engaging in 'brinksmanship' . . . At the least he can avoid coercive speech simply by avoiding conscious overstatements he has reason to believe will mislead his employees."

Under the decisions herein, however much an employer avoids "brinksmanship", he always runs the risk of having his speeches labeled coercive, since the actual content of his statements becomes immaterial, and the only materiality lies in the subjective belief of select listeners, a factor over which has no control. Upon this decision herein, an employer is risking an 8(a)(1) finding by merely answering questions with correct and affirmatively required statements of law, (footnote 27, *supra*). The obvious effect of this fact finding technique will be to deter employers from exer-

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[29] *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292; *Acme Products, Inc.* v. *NLRB*, 389 F. 2d 104, (CA 8, 1968); *NLRB* v. *Arkansas Grain Corp.*, 392 F. 2d 161, (CA 8, 1968).

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cising the only action available to them during the course of union organizing campaigns, free speech.

Because of the central and abiding importance of the correct application of the substantial evidence test to employer free speech in the area of labor relations law, this issue warrants further review by this Court.

4. The Decisions of the Board and the Court Herein Raise Significant Questions Concerning the Proper Application of the Standards Set Forth in NLRB v. Gissel for Determining the Appropriateness of Remedial Bargaining Orders.

a) In its initial decision in the instant case, the U. S. Court of Appeals for the District of Columbia remanded the case to the National Labor Relations Board to determine whether, in light of the guidelines laid down by this Court's intervening decision in *NLRB* v. *Gissel Packing Co.*, "even in the absence of an 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of the (unfair labor practices)". "In making that determination", the Circuit Court added: "the Board should consider whether in view of the company's unfair labor practices, 'the risks that a rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards'."

In its Supplemental Decision and Order, the Board made no attempt to explicate the reasons why they believed a fair rerun election would be impossible, other than to enumerate the unfair labor practice charges previously found. No analysis was made as to the seriousness of the alleged unfair labor practices, their impact at the time of commission or their lingering effects on the unit employees during the approximately three and one-half years subsequent to the elec-

tion which the union lost. Instead, the Board merely summarized what it had earlier found and added the conclusionary language that "in this case, the employee sentiment expressed through the cards is a more reliable measure of employee desires and that statutory policies are better effectuated by issuing a bargaining order than directing a rerun election."

The Board offered no explanation as to how the post election modification of benefits, unrelated in time or purpose to any pending election, could affect the reliability of a further election.[30] The Board made no effort to assess the effect of the 8(a)(3) violations, as found, in relation to the general context in which they occurred,[31] or of their possible effect upon a further election following offer of reinstatement to these employees.

Paraphrasing the language used in *Gissel,* is not what was required of the Board on remand by the U. S. Court of Appeals. Nor do the Board's unsupported conclusions comport with the standards re-

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[30] *Cf. Champion Pneumatic Machinery Co.*, 152 NLRB 300, 306, wherein the Trial Examiner stated, with Board approval:

> "General Counsel's position is that by establishing the granting of benefits while the representation case was pending he had established a violation of Section 8(a)(1). Again I must disagree."
>
> . . .
>
> "To find a violation here would be to hold that all wages and other working conditions must remain fixed from the time a petition is filed, or a campaign instituted, until the petition is ultimately disposed of. I cannot endorse so unrealistic a view."

[31] Although there was a finding of 8(a) (3) violations as to the termination of these six employees, their termination occurred in a context of general economic layoffs and terminations, affecting all but 97 employees and resulting finally in a work force reduction from 342 employees to approximately 220 employees. (J.A. 142).

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quired of administrative agencies in rendering decisions.[32]

b) It is now almost four years since the NLRB election first took place. At least two Circuit Courts of Appeal have held that the passage of time, coupled with other circumstances, may be decisive in assessing whether a new election would be the preferable means of determining employee preference.[33] Though the Board and another U. S. Court of Appeals have reached a contrary substantive disposition, after considering the issue of lapse of time,[34] both decisions,

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[32] *NLRB* v. *Metropolitan Life Insurance Company*, 380 U.S. 438; *WAIT Radio* v. *F.C.C.*, 418 F.2d 1153. (C.A. D.C. 1969).

[33] *NLRB* v. *Clark's Gamble Corporation*, 407 F. 2d 179 (6 C.A. 1969). Remand, 396 U.S. 23, remanded to Board — F.2d — (Mar. 4, 1970) (73 LRRM 2669); *NLRB* v. *American Cable Systems, Inc.*, — F. 2d — (C.A. 5, March 30, 1970) (73 LRRM 2913). In *American Cable Systems, Inc.*, the Fifth Circuit read Gissel to mean "that no bargaining order should be issued unless at the time the Board issues such an order it finds the electoral atmosphere unlikely to produce a fair election." Elaborating, the Court went on to add:

> "In the instant case the Board made no such finding before it issued the December 3, 1969, bargaining order which we are here asked to enforce. Instead, on remand the Board refused to look at the contemporary necessity for such an order, satisfying itself with a jejune regurgitation of the Company's 1965 waywardness.
>
> "We deem such findings insufficient under the teachings of Gissel to justify a 1970 bargaining order. Gissel does not apply a nunc pro tunc principle, giving the then sins of the Company a now application. It requires contemporaneity—a present view, albeit with an historical perspective. Industrial democracy should be allowed to work its will if the present conditions are sufficiently septic for an election." (— F. 2d at —)

[34] *NLRB* v. *L. B. Foster Co.*, — F.2d — (9th Cir. 1969) cert. denied — U.S. — (March 23, 1970); *Lou DeYong's Market Basket, Inc.*, 181 NLRB No. 10 (Feb. 13, 1970).

unlike the instant one, considered this a factor which merited discussion.

This difference of opinion between two Circuit Courts of Appeal should be resolved. Enlightenment as to the propriety of the Board's application of *Gissel* herein, is of particular importance in view of the great number of remanded cases of this nature, and the tremendous significance that bargaining order remedies have on future labor relations.

c) Even assuming that its analysis in this case meets the *Gissel* standards, the Board's conclusions rest on the premise that every facet of the company's conduct, separately listed in its decision, constituted a violation of the National Labor Relations Act and together supported its conclusions under the Gissel standards. Should any aspect of the company's activity denominated an 8(a)(1) violation by the Board, be found to be a lawful exercise of protected employer rights, then the basis of the remedial bargaining order is undermined. The lump sum treatment on the Board's part, as approved herein, permits no other result. If, therefore, as petitioner earnestly contends, *supra,* the preelection 8(a)(1) findings are unfounded as a matter of law, the bargaining and recognitional remedies as ordered by the Board and Court below, are equally unfounded.

To settle the present disparity of treatment which characterizes Board and reviewing Court decisions in this area, this Court should reexamine this aspect of the judgment below.

CONCLUSION

For the Foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be granted.

Respectfully submitted,

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April 22, 1970

APPENDIX

APPENDIX

APPENDIX A

[Filed February 9, 1970]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
SEPTEMBER TERM, 1969

No. 21,785

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC., *Intervenor*

No. 21,832

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO, *Intervenor*

Before: Wright, Leventhal and Robinson; Circuit Judges, in Chambers.

Order

On consideration of the petition for rehearing filed herein by counsel for Garland Knitting Mills of Beaufort, South Carolina, Inc., it is

ORDERED by the Court that the aforesaid petition is hereby denied.

Per Curiam

APPENDIX B

[Filed December 30, 1969]

Judgment After Remand

Before: Wright, Leventhal and Robinson Judges, Circuit Judges, in Chambers.

THESE CAUSES are before this Court upon a motion of the National Labor Relations Board for enforcement of its order following proceedings pursuant to the Court's remand in which the Board issued a supplemental decision and order; and upon a motion of petitioner, Garland Knitting Mills of Beaufort, South Carolina, Inc., for review of the supplemental decision and order of the Board dated September 11, 1969. The Court, having considered the memorandum of changed factual situation filed by petitioner Garland, and the responsive pleadings filed with respect to the aforesaid motions, entered an order on October 29, 1969, granting the motion of the Board for enforcement of its order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Garland Knitting Mills of Beaufort, South Carolina, Inc., its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

/s/ J. SKELLY WRIGHT
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ HAROLD LEVENTHAL
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

/s/ SPOTTSWOOD W. ROBINSON, III
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

APPENDIX C

[Filed October 29, 1969]

Order

On consideration of (1) the motion of the National Labor Relations Board for enforcement of its order after proceedings pursuant to remand; (2) the motion of petitioner, Garland Knitting Mills of Beaufort, South Carolina, Inc., for review of the supplemental decision and order of the Board filed after the proceedings had on remand and; (3) the motion of petitioner, Garland Knitting Mills of Beaufort, South Carolina, Inc., for leave to file a memorandum of changed factual situation and of the responsive pleadings filed with respect to the aforesaid motions, it is

ORDERED by the Court that the motion of Garland Knitting Mills of Beaufort, South Carolina, Inc., for leave to file its lodged memorandum be granted and the Clerk is directed to file said lodged memorandum and, it is

FURTHER ORDERED by the Court that the aforesaid motion of the Board for enforcement of its order is hereby granted and counsel for Board, within 14 days from the date of this order shall serve upon opposing counsel and file with the Clerk of this Court a proposed judgment pursuant to the provisions of Rule 19 of the Federal Rules of Appellate Procedure.

Per Curiam

APPENDIX D

Memorandum of Petitioner Garland of Changed Factual Situation

The National Labor Relations Board in its Supplemental Decision and Order dated September 11, 1969 affirmatively directed the Petitioner Garland Knitting Mills of Beaufort, South Carolina, Inc. (the Company) to offer reinstatement with back pay to six employees who the Board found had been discharged or laid off because of their union activities. In addition, the Board directed the Company to bargain collectively with the Union, and to post the appropriate notices.

The Company, by this memorandum, advises the Court that on September 24, 1969 the Company has complied with that portion of the Board's Order requiring the Company to offer full and immediate reinstatement to employees Houston, Crumley, Walker, Ebbs, Julia Frazier and Rebecca Frazier to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and to make them whole for any loss they may have suffered by reason of the Company's discriminatory conduct.

Compliance with this portion of the Board's Order was made on September 24, 1969 when the Company made an offer to each of these six employees as required by the Board.

By complying with this portion of the Board's Order there remains only the duty to bargain portion of the Board's Order for review by the Court. For the reasons cited in the Company's Motion for Review of the Board's Supplemental Decision and Order, the Company respect-

fully requests that the Court take these changed facts into consideration in deciding the Motion for Review.

GARLAND KNITTING MILLS OF
BEAUFORT, SOUTH CAROLINA, INC.

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APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Cases 11-CA-3067
11-CA-3148
11-CA-3188

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC.

and

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO

Supplemental Decision and Order

On March 28, 1968, the National Labor Relations Board issued its Decision in the above-entitled proceeding,[1] finding that Respondent had engaged in certain conduct in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom, and to take certain affirmative action, set forth therein. Thereafter, on July 18, 1969, the United States Court of Appeals for the District of Columbia Circuit entered its order in these cases,[2] enforcing the Board's 8(a)(1) and (3) findings and affirming the Board's factual finding that the Union, on March 7, 1966, possessed valid designation cards from a majority of the employees in the unit. However, the Court remanded the remaining portion of the decision for reexamination of the Board's 8(a)(5) finding and its order to bargain in the light of the guidelines laid down by the Supreme Court's

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[1] 170 NLRB No. 39.

[2] *International Ladies' Garment Workers' Union, AFL-CIO* v. *N.L.R.B. (Garland Knitting Mills of Beaufort, South Carolina, Inc.)*, — F.2d —, (C.A.D.C.).

intervening decision in *N.L.R.B.* v. *Gissel Packing Company*,[3] stating:

> . . . we remand this case to the Board to determine whether, (even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of the [company's unfair labor practices].' In making that determination the Board should consider whether, in view of the company's unfair labor practices, 'the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards . . . .' [citations omitted.]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

Having accepted the remand, the Board, on July 31, 1969, issued a Notice granting permission to the parties to submit statements of position with respect to the issue remanded by the Court of Appeals. Such statements were duly filed by the Respondent and the General Counsel.

The Board has considered the statements of position and the entire record in this proceeding and, for the reasons set forth below, shall reaffirm its original finding that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as majority representative of the employees, and further finds that a bargaining order is necessary to effectuate the purposes and policies of the Act in these cases.

The record shows that in the period immediately preceding the election, Respondent, through its president, Bernat, violated Section 8(a)(1) and interfered with employee freedom of choice in the impending election by (1) promising increases in piece rates and wages; (2) by stating, "if the Union did not win the election the employees

[3] 395 U.S. 575.

would never want a union again because they would be treated so good they would not want one"; (3) by statements that employees would be taken care of and improvements would be made; and (4) by distributing antiunion tags, through supervisors, under conditions which coerced employees to openly declare themselves for or against the Union. The Union, though possessing valid authorization cards from a majority of the employees, failed to receive a majority in the election, which was subsequently set aside on the basis of Respondent's unlawful conduct. On the day of the election, but after the ballots were tallied, Bernat addressed the employees, and while hailing the vote as a great victory, stated "All of the time rates will be increased within the next three weeks and the piece rate structure will be reviewed and changed within the next six weeks." During the ensuing weeks, Respondent, in the face of the Board's investigation of the Union's objections to the election, granted these and other benefits despite the unresolved status of the question concerning representation. Thereafter and while the charges filed in Case 11-CA-3067 were pending, Respondent violated Section 8(a)(3) by discharging or laying off six employees because of their union activities.

Insofar as relevant here, the Supreme Court in *Gissel, supra,* approved the Board's authority to issue a bargaining order to redress unfair labor practices "so coercive that, even in the absence of a Section 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those [unfair labor practices]."[4] Additionally, in circumstances where the unlawful conduct is less flagrant in nature, the Court held that the Board may find an 8(a)(5) violation and issue a bargaining order where "the possibility of erasing the effects of [the] past practices and ensuring a fair election (or a fair rerun) by the use of traditional remedies . . . is slight and . . . [therefore] employee sentiment once expressed through cards

[4] *Id.* p. 614.

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would, on balance, be better protected by a bargaining order . . . ."[5]

In our opinion, a bargaining order is warranted on the facts of this case under either of the above standards. The unfair labor practices committed by Respondent included a half-dozen discriminatory discharges or layoffs of employees, in addition to serious 8(a)(1) violations. These unfair labor practices tended to destroy the Union's majority and in the aggregate were so flagrant and coercive in character as to require, even in the absence of an 8(a)(5) violation, a bargaining order to repair their effect. Moreover, it is unlikely that the lingering coercive effect of these unfair labor practices could be neutralized by conventional remedies so as to ensure a fair rerun election. We therefore find that the employee sentiment expressed through the cards is a more reliable measure of employee desires and that statutory policies are better effectuated by issuing a bargaining order than directing a rerun election. Accordingly, we shall reaffirm the unfair labor practice findings and the remedy provided therefor in the original Decision and Order herein.

Supplemental Order

In view of the foregoing, and on the basis of the record as a whole, the National Labor Relations Board reaffirms its Order of March 28, 1968, in this proceeding.

Dated, Washington, D. C., September 11, 1969.

.....

Frank W. McCulloch, *Chairman*

.....

John H. Fanning, *Member*

.....

Gerald A. Brown, *Member*

(Seal) National Labor Relations Board

[5] *Id.* p. 614.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,785

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC., *Intervenor*

No. 21,832

GARLAND KNITTING MILLS OF BEAUFORT, SOUTH CAROLINA, INC., *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO, *Intervenor*

Petitions to Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board

Decided July 18, 1969

Mr. Jerry D. Anker, with whom *Mr. Morris P. Glushien* was on the brief, for petitioner in No. 21,785 and intervenor in No. 21,832.

Mr. William H. Smith, Jr., with whom *Messrs. E. Riley Casey* and *Brian J. O'Neill* were on the brief, for petitioner in No. 21,832 and intervenor in No. 21,785.

Mr. Robert M. Lieber, Attorney, National Labor Relations Board, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Messrs. Arnold Ordman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Warren M. Davison*, Attorney,

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National Labor Relations Board, were on the brief, for respondent.

Before WRIGHT, LEVENTHAL and ROBINSON, *Circuit Judges.*

PER CURIAM: These appeals are before the court on petitions to review and cross-application for enforcement of an order of the National Labor Relations Board issued against Garland Knitting Mills of Beaufort, South Carolina, Inc. Decision here was deferred awaiting the Supreme Court opinion in the *Gissel Packing Co.* and *The Sinclair Company* cases.[1] Armed by the teaching of those cases, we remand this case to the Board to determine whether, "even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of the [company's unfair labor practices]."[2] In making that determination the Board should consider whether, in view of the company's unfair labor practices, "the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards."[3] Otherwise we affirm the order of the Board.[4]

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[1] *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, — U.S. —, *The Sinclair Company* v. *N.L.R.B.*, — U.S. —, 37 U.S. L. WEEK 4536 (June 16, 1969).

[2] *Id.*, slip opinion at 37.

[3] *Ibid.*

[4] The Board found that the company violated § 8(a)(1) of the Act by promising benefits to the employees prior to the election; by granting benefits to the employees following the election; and by distributing company garment tags among the employees and observing who accepted them. The Board further found that the company violated § 8(a)(3) and (1) of the Act by discharging or laying off six employees because of their union activities. These findings are fully supported by substantial evidence in the record viewed as a whole. *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951). The evidence on which these findings are based is fully recited in the trial examiner's report. No useful purpose would be served by repeating it here.

The Board here properly found on substantial evidence that on March 7, 1966, the union possessed valid designation cards from a majority of employees in the unit. But then, as it did concerning the Gissel Packing Company in *Gissel*, using *Joy Silk Mills*[5] as its guide, the Board found that the company's rejection of the union's bargaining demand was in bad faith and violative of Section 8(a)(5). The Board made no finding, as it did in *The Sinclair Company*, that the company's unfair labor practices were such "that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the[ir] unlawful effect * * *."[6] *Compare Retail Store Employees Union Local 880* v. *N.L.R.B.* [*Kinter Brothers*], — U.S. App. D.C. —, — F.2d — (Nos. 21,551 and 21,615, decided July 10, 1969).

Under the circumstances, we have no alternative but to remand this old case back to the Board for reconsideration in the light of *Gissel*.[7] We retain jurisdiction and require the Board to act within 60 days.

So ordered.

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[5] *Joy Silk Mills* v. *N.L.R.B.*, 87 U.S.App.D.C. 360, 364, 185 F.2d 732, 736 (1950), *cert. denied*, 341 U.S. 914 (1951).

[6] *Supra* Note 1, slip opinion at 37.

[7] *Id.*, slip opinion at 32-38.

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APPENDIX G

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, et seq.) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

. . .

(c) The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed,

graphic, or visual form. shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

REPRESENTATIVES AND ELECTIONS

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: . . .

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10 . . .

. . .

(e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive . . .

(f) . . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

. . .

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